SUPREME COURT, U. S.

# 71-1343

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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NO. A-1057

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JOSEPH ROSSI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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## INDEX

Opinions Below.....2

Jurisdiction.....3

Questions Presented.....3

Statement of Facts.....4

Argument.....20

Conclusion.....31

Appendix A.....18, 19
(Criminal Tape Recording)

Appendix B.....27
(Transcript of Record, pp 163-172)

## CASE CITATIONS

Morei v. United States.....29
127 F.2d 827 (6th Cir. 1942)

Nye & Nisson v. United States.....29
336 U. S. 613 (1949)

Robinson v. United States.....30
262 F.2d 645 (9th Cir. 1959)

United States v. Falcone.....24
311 U.S. 205 (1940)

United States v. Peoni.....29
100 F.2d 401 (2d Cir. 1938)

United States v. Warner.....22, 24
821 (5th Cir. 1971)

INDEX
(continued)

SECTIONS CITED

21 U.S.C. Section 176a.....2, 20

28 U.S.C. Section 1254(1).....3

18 U.S.C. Section 371.....24

18 U.S.C. Section 2.....28

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# BRIEF FOR THE PETITIONER

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TO WARREN E. BURGER, CHIEF JUSTICE,

AND TO THE ASSOCIATE JUSTICES OF

THE SUPREME COURT OF THE UNITED STATES

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Petitioner JOSEPH ROSSI respectfully

requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit affirming the verdict of the trial court.

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## OPINIONS BELOW

Petitioner and four co-defendants were indicted on five counts alleging violations of 21 U.S.C. Section 176a. Petitioner plead not guilty and moved to dismiss the indictment and suppress evidence. These pre-trial motions were denied.

At time of trial Petitioner moved for and was granted a separate trial. Following introduction of all the evidence he moved for a judgment of acquittal on all counts. The court granted his motion as to counts 2 and 3 only. Petitioner stood trial and was found guilty of the remaining charges; thereafter he was committed

to the custody of the Attorney General for a period of five years.

Timely notice of appeal was filed and Petitioner was admitted to bail pending appeal. In a per curiam opinion the Ninth Circuit affirmed the conviction. A Petition for Rehearing was denied March 7, 1972.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

The factual circumstances surrounding this matter undisputedly involve a large spectrum of marijuana trafficking, from acquisition to transporting to sale. There is no doubt but that Petitioner occupied one of those niches. The questions are which one and is that what he was convicted of?

Rossi was convicted of (1) smuggling of marijuana, (2) receiving, concealing

and facilitating the concealment of marijuana, and (3) conspiracy to do the same. What becomes clear from an examination of the evidence presented, however, is that it was wholly insufficient to provide a basis for conviction on those charges. Whatever he should have been charged with is another story. The fact is that he was convicted as charged.

It is Petitioner's position, and upon this we respectfully request a hearing, that the evidentiary foundation supporting the conviction is so shallow that it must collapse under scrutiny.

STATEMENT OF FACTS

In March of 1970 Arturo Arreola Placer (Arreola) received a telephone call from someone named "Joey", later identified as Petitioner herein Joseph Rossi (T.R. 28)*. Joey had been making deals with a friend of Arreola's named Emilio, then recently deceased, and wanted to buy 50 to 100

*(Transcript of Record)

kilos of marijuana (T.R. 28, 29, 69). Arreola said he would call a friend of his to see if there was any chance to get some kilos (T.R. 29).

Arreola then called Thomas Carillo, a co-defendant, at his upholstery shop in Downey, California, and found that Carillo would provide 50 or 75 kilos for Arreola to sell to Joey (T.R. 30, 31). Arreola then called Joey and told him he could sell him some kilos of good quality marijuana, like Emilio had been selling him before (T.R. 31).

Joey then went to the apartment in Downey that Arreola shared with Antonio "Tony" Valdez, another indicted co-defendant, and paid Arreola $125 each for 50 kilos which Arreola had gotten from Thomas Carillo's upholstery shop (T.R. 32-34). Joey was satisfied with the size and quality and said that if they obtained more he would buy 50 or a hundred more

(T.R. 34).

At that time Joey did not know where the marijuana was coming from other than that a friend of Arreola's brought it in from Mexico. The name of the friend was not mentioned at that time (T.R. 34).

Arreola's kickback on the sale was $10 per kilo and he split the money with Tony Valdez (T.R. 36).

On or about March 14, 1970 - and approximately two days after the sale to Joey - Thomas Carillo planned a trip to Tijuana to pick up another 50 kilos (T.R. 35). Tony Valdez, Anita Davis, Margarita Gamez (Arreola's wife), Thomas Carillo and Arreola all went to Tijuana to make a pickup and border crossing (T.R. 36). Joey was not on the trip (T.R. 36). After making the pickup, Arreola and Carillo waited at the Oscar's Drive-In on the United States' side and watched the border to see if the "mule" vehicles

driven by Antonio Preciado and Anita Davis were successful in getting past Customs (T.R. 37, 38). The red Chevrolet driven by Preciado was stopped and pulled over for inspection; Preciado ran into Mexico and escaped (T.R. 38). Arreola and Margarita Gamez testified that they both had seen the red Chevrolet before in Thomas Carillo's upholstery shop (T.R. 38, 39, 143). Subsequent testimony revealed that Carillo had modified the gas tank to hold marijuana and that 22 'bricks' were taken from it (T.R. 55, 112).

Anita Davis successfully cleared the border check and, after conferring with Thomas Carillo and Arreola at Oscar's Drive-In, went home to await Carillo's telephone call (T.R. 39).

The foregoing facts provided the factual basis for counts 2 and 3 of Petitioner's indictment. They were dismissed upon motion of counsel at the

close of evidence. The basis for counts 4 and 5 all relate to the circumstances surrounding a second smuggling attempt in May of 1970.

Between March 14 and May 29, 1970, Arreola made three more sales of 50, 50 and 75 kilos to Joey (T.R. 40, 41). On one of those occasions Joey met Carillo for the first time (T.R. 72). Joey was at Arreola's apartment checking out the kilos for size and weight and Carillo arrived (T.R. 42). Joey did not know Carillo was coming to the apartment (T.R. 75). Joey and Carillo got into an argument concerning the size and quality of the kilos. Arreola felt it would jeopardize the sale and asked Carillo to leave the room or he would not be able to make the sale (T.R. 42). Joey told Arreola that he didn't want to make any more deals because he didn't like Carillo (T.R. 42). Thereafter Joey bought the kilos,

paying only $115 because they were small. When Arreola gave the money to Carillo, Carillo told him he couldn't make deals with him anymore if he was going to sell it to Joey (T.R. 43).

Up to the time of meeting Carillo in Arreola's apartment Joey had not known where the kilos were coming from, although all of them had in fact come through Carillo (T.R. 71).

At some time prior to May 29, 1970, Arreola and Carillo made plans for Arreola to go to Mexico for some more kilos. Under their agreement Arreola was to meet "Armando", Carillo's contact in Mexico, at Rosarita Beach (T.R. 45, 46). Armando's job was to line up the marijuana for Carillo and keep it for him until it was picked up in Ensenada (T.R. 46).

Arreola called Joey on May 28, 1970, and told him he was going to Mexico for more kilos (T.R. 43, 44). Joey said he

would buy the kilos when they got back and reiterated his desire for good quality and size (T.R. 44).

At this point the first real dispute in the testimony concerning the May 29th trip occurred. On direct examination by the United States, Arreola testified: "And he said, 'I would like to go with you to Mexico.'" (T.R. 44). On cross examination, however, the topic was explored further:

"Q. And didn't you invite him to go to Mexico?

A. No, sir. He say--he told me he was went to Mexico to do something, some business. And I told him, 'You can go along with me.'

Q. You asked him--excuse me--I didn't mean to cut you short.

A. He says he was going to Tijuana to buy some gold pesos and he told me if I knew some people where he could go and

buy it. I said, 'Yeah, I can take you there.'" (T.R. 75,76)

On or about May 29, 1970, Abraham Castro, Beatrice Arvesa (subsequently Castro's wife [T.R. 115]), Arreola, Margarita Gamez (Arreola's wife) and Joey left for Mexico. Arreola drove his own car, a '64 Thunderbird (T.R. 44, 45, 117), and Castro drove a pink '53 Cadillac (T.R. 45, 117). Joey drove in his own car, a blue '69 Camaro (T.R. 44).

They left Downey in the three cars at three or four in the afternoon (T.R. 49, 128) and arrived in Tijuana in the late afternoon or evening (Arreola testified it was daytime upon arrival [T.R. 49], Beatrice Arvesa testified it was dark, perhaps 9:00 p.m. [T.R. 122, 127]). Upon arrival Arreola left the group in the hotel rooms and went alone in the pink Cadillac to try and meet Armando at Rosarita Beach (T.R. 46, 47, 77). Armando

was not there that evening so he returned to the hotel. The following morning he went early and met Armando at Rosarita Beach (T.R. 47). The only ones present were Arreola and Armando. Arreola got 50 kilos of marijuana from Armando, loaded them under the back seat of the Cadillac and returned to the hotel room (T.R. 48).

Upon Arreola's return a "conversation" (see T.R. 83, lines 10-17) took place which was another link in the chain of circumstantial evidence which purportedly linked Rossi to the agreement between Carillo, Arreola, Gamez, Arvesa, Castro, and Armando:

"Q. Did you have any conversation with Joey about the marijuana?

A. The only thing he say, he say, 'You got the marijuana?'

I say, 'Yes.'

'How much kilos you got?'

'50 kilos, that's all.'"(T.R. 48)

Extensive cross examination concerning this subject failed to elicit any new information:

"Q. Well, you testified that when Agent Lucido asked you the question whether you had any conversation regarding marijuana with Joey when you were in Mexico you said, 'No, Joey left for the United States by himself.'

A. The only thing Joey asked me in the apartment, he say, 'Did you get the kilos?'

I say, 'Yes'.

'How many kilos you got?'

I tell him, '50 kilos'.

He say, 'Okay, see you later'.

Q. So you did have a conversation with Joey regarding marijuana when you were in Mexico?

A. The only thing he says, 'You've got marijuana?' I said, 'Yes, 50 kilos'.

Q. Why did you tell Agent Lucido

there was no conversation on June 24 when you talked to Agent Lucido?

A. When I told Lucido, I told him only thing Joey said to me, 'Did you get the marijuana?'.

I said, 'Yes'.

He never saw the kilos but he told me, 'How much kilos you got?'

I told him, '50 kilos'.

He never ask me no more questions." (T.R. 81).

Cross examination continued in this vein for another two pages of the Transcript. It was clear that Arreola, the prosecution's chief witness, felt that nothing else was said between them (T.R. 83).

Beatrice Arvesa, who could "just barely" (T.R. 124) overhear the conversation, testified that they had all been in one room together having 'normal' conversation (T.R. 125). When Joey and Arreola

had their conversation she was approximately six feet away (T.R. 83, 124). She never heard Joey's voice at all and the only comment she heard was to the effect that the marijuana was in the pink Cadillac (T.R. 125). The comment was made by Arreola and was not in response to any question asked by Joey (T.R. 126).

Shortly thereafter Joey left the group. Arreola thought Joey left Tijuana at 10:30 a.m. (T.R. 49); Beatrice Arvesa testified it was around 2:00 p.m. (T.R. 122, 123, 129); and Margarita Gamez testified it was before noon (T.R. 137). All of the marijuana was still in the Cadillac when Joey left (T.R. 50).

Joey was not seen or heard from by anyone herein mentioned until he was contacted on June 24th, 1970, by Arreola, who was calling at the urging of United States Customs Agent Lucido.

Following Joey's departure from

Tijuana on May 30th, Arreola divised a plan to put half of the kilos in the Thunderbird (T.R. 50). That night or the next night they (Arvesa, Castro, Gamez and Arreola) took a drive to Ensenada to transfer part of the marijuana into the Thunderbird (T.R. 50, 51, 120, 121, 137, 138). They returned to Tijuana after the transfer (T.R. 51, 121).

The following morning Arreola and Margarita Gamez had an argument (T.R. 51, 121, 137). She was apparently mad because he was loaded (T.R. 52). They were in a restaurant in Tijuana and when Arreola got up to go to the restroom she said, "If you're going to do it again, I'm going to leave right now." (T.R. 52). About 15 minutes (T.R. 52) later she got in the Thunderbird and started across the border (T.R. 52, 121). She was stopped and the car was taken to the inspection area where 20 kilos of marijuana were discov-

ered under the back seat (T.R. 108, 109).

Arreola then found someone in Tijuana to store the kilos that were still in the Cadillac (T.R. 53). At some time thereafter they left Tijuana for the United States.

Three to five days after the arrest of his wife, Arreola contacted Deputy Sheriff Maser at the East Los Angeles Substation of the Los Angeles County Sheriff's Department (T.R. 61, 62). Maser then contacted U. S. Customs Agent Robert Lucido in San Pedro, California (T.R. 63, 64) and arranged for them to talk to one another. Arreola and Agent Lucido met on four or five occasions (T.R. 67), during which Arreola gave statements concerning the smuggling operations (T.R. 66, 152).

On June 24, 1970, Arreola met with Agent Lucido in the U. S. Customs House in San Pedro, California (T.R. 152, 156) and gave another statement. On that date

Agent Lucido requested that Arreola telephone Joey (T.R. 156); they discussed and outlined the questions for Arreola to raise (T.R. 156, 157). The stated purpose was to "...get the truth and general conversation that he previously had with Joey." (T.R. 157).

The first call was made June 24th from a pay telephone in the Downey area (T.R. 157). It is set forth in full in Appendix A, pages 3-9. The second call was made July 18, 1970; it is also set forth in full in Appendix A, pages 9-14.

A careful reading of the transcript of these calls reveals a Joey who really 'cooled it' on the trafficking scene. He'd gotten a job, gone back to school to learn a trade, and stopped selling marijuana. He'd been burned for $9,000 and wanted to "...get the hell out of it."

Nothing was said in the June 24th conversation that linked Rossi to the actual

smuggling activities of the May 29th trip. In the July 18th conversation Arreola baited a susceptible Joey with 43 non-existant kilos of marijuana (T.R. 160, 161). After asking the price, Joey asked "what happened to those twenty you had down in Mexico that was supposed to be left of mine?" (Appendix A, Page 11, lines 23-25).

This was the final link in the alleged conspiracy chain. The elements were:

(1) Rossi bought kilos of marijuana from Arreola both prior and subsequent to March 14th and he would have bought whatever reached here from the May 29th trip, had any reached here;

(2) Rossi had a telephone conversation with Arreola prior to the May 29th trip in which he learned that Arreola was going to Tijuana to pick up a load of kilos;

(3) Rossi went to Tijuana at the same time as the others and stayed in the

same hotel;

(4) When Arreola returned from his meeting with Armando, Rossi asked him (a) if he had the kilos and (b) how many there were; and,

(5) During the course of a conversation designed to obtain admissions from Rossi, reference was made to the 20 bricks that Arreola left in Tijuana.

Petitioner contends that these five elements, whether individually or collectively, are insufficient to establish Rossi's participation in a conspiracy.

## ARGUMENT

### I. A CONVICTION OF CONSPIRACY TO SMUGGLE MARIJUANA MAY NOT STAND WHERE THE EVIDENCE FAILS TO ESTABLISH AN AGREEMENT TO COMBINE EFFORTS FOR AN ILLEGAL PURPOSE.

Going back approximately one year from this date (to 440 F.2d), Petitioners found 69 reported appeals from convictions arising under 21 U.S.C. 176a. Of these,

only 13 involved convictions for conspiracy and only 5 questioned the sufficiency of the evidence supporting the conspiracy. All of them found the evidence sufficient.

Naturally Petitioners lament the scarcity of decisions dealing with the quantum of evidence required before an alleged conspiracy can be submitted to the jury. It seems, however, that the nature of our criminal appellate process is such that we just see the cases in which convictions were returned. But this is just the point: at the time the matter is on appeal, the presumption of the correctness of the conviction is so strong that it can scarcely be overcome. In the instant case, for example, a judge who had serious doubts concerning Rossi's purported role in the smuggling operations nevertheless permitted the case to be submitted to the jury - a jury which having heard testimony of Rossi's prior purchases

of large quantities of marijuana could hardly help but harbor some ill feelings toward him.

Only one case lends support to Petitioner's contention that the evidence offered at trial was insufficient for the judge to submit the charge to the jury. In United States v. Warner, 441 F.2d 821 (5th Cir. - 1971), ten defendants were indicted for violation of, and conspiracy to violate, 21 U.S.C. 176a. Following conviction defendants challenged the sufficiency of the evidence offered to prove the conspiracy. The opinion, therefore, contains an extensive factual statement. On inspection a number of similarities emerge, including a motion for acquittal at the conclusion of all evidence. The motion was denied as to all except one, Michael Young. Since the motion was granted at the trial level and was not formally at issue on appeal, the value as

precedent herein is certainly questionable. Nevertheless, a detailed factual statement related Young's alleged role as co-conspirator: (1) he traveled to Mexico with and lodged with the other co-defendants; (2) he attended a meeting at the Cafe Monumental with five co-defendants in circumstances which make it appear likely that Young knew of the smuggling plan; (3) he was present at a rendezvous in a desolate desert location where 800 lbs. of marijuana was transferred between vehicles; and (4) he was with co-defendant Jacobson in the latter's bus when they were arrested. A search of the bus revealed incriminating evidence. The trial court found this evidence insufficient and acquitted Young of all charges.

In affirming the conviction of the remaining co-defendants the court also dealt with the requirements of a conspiracy charge. It stated:

"The essential elements of the federal crime of conspiracy, 18 U.S.C. 371, are an agreement by two or more persons to combine efforts for an illegal purpose and an overt act by one in furtherance of the agreement." United States v. Warner, supra, at 830; citing United States v. Falcone, 311 U.S. 205 (1940) [emphasis theirs].

We contend that - however reprehensible the transaction herein may have been - it nevertheless failed to establish any conspiracy to smuggle that involved Joseph Rossi. One who opts for affirmance of the trial court's decision faces more loose ends than an octopus has tendencies:

What was the agreement? Arreola had nothing to lose and everything to gain by telling all he knew; why didn't he testify about an agreement; why didn't the prosecution ask him what the agreement was; why, with three prosecution witnesses

actually involved in the May 29th smuggling attempt, was not testimony elicited about an agreement among them?

Where or when was the agreement supposed to have taken place, when Arreola called Joey and told him that he would have some more kilos in a few days? When he offered to put Rossi in touch with someone in Tijuana who dealt in gold pesos; when he went to Mexico to see about them?

What was the illegal purpose which they allegedly agreed to further? Arreola couldn't care what Rossi did with the kilos once he had paid for them. Similarly, Rossi was not concerned about the logistics of acquisition; he only bought kilos once they were in the United States.

How was Rossi agreeing to further the illegal purpose of smuggling by merely purchasing them? If you accept the theory that Rossi's purchases provided an outlet

for the smuggling, then why wasn't he also charged with all of the other purchases he had made prior to May 29th?

Why would Rossi become involved in a conspiracy with Carillo, a man he neither liked nor trusted and about whom he had stated an intention to no longer deal with? Conversely, why would Carillo, who shared similar animosities toward Rossi, want to involve him in a smuggling operation?

Why would Rossi, if he was a co-conspirator, take a separate car to Tijuana, be absent at the actual transaction with Armando, leave three days before the others had even thought of leaving, and upon Arreola's return, only question him to the extent of asking whether or not he had gotten the marijuana and how much he had gotten. (Much as any of us might ask, upon learning that a friend had just seen a movie, "How was it?")

Why, if Arreola's true intent was that

Rossi was to be a part of their smuggling operation, was the extent of his testimony limited to stating that Rossi had said he would buy the kilos when they were brought into the United States?

The resolution of these inconsistencies lies with the prosecution's theory of guilt. The Transcript of Record at pages 163 to 172 (set forth herein as Appendix B) best reveals their theory: Rossi "...said that he would buy the marijuana when it was brought into the United States... He provided a source for sale." (T.R. 166)

Petitioners submit that providing an outlet for sale fails to fulfil the substantive requirements of the charge of conspiracy to smuggle marijuana. Without pushing the prosecution's theory to absurdity, one wonders at what point the 'source for sale' proposition would end. Would it, for example, permit conviction of a street seller on a conspiracy count merely because

he is a source for sale? We contend that it should not.

II. A CONVICTION OF AIDING AND ABETTING A SMUGGLING OPERATION MAY NOT STAND WHERE THE EVIDENCE FAILS TO ESTABLISH THAT DEFENDANT INCITED, PROCURED, ENCOURAGED, ASSISTED, OR OTHERWISE FURTHERED THE SMUGGLING OPERATION.

At the conclusion of the trial the prosecution requested and the jury received, instructions on 'aiding and abetting' as well as those relating to the conspiracy and the substantive counts. Title 18 U.S.C. Section 2 provides that an aider and abetter shall be punished as a principal. Therefore, a finding that Petitioner aided and abetted the others would validate the conviction on the substantive counts. We contend, however, that the evidence at best established Rossi as an accessory after the fact and that it was error to deny Petitioner's motion for acquittal and thereafter submit the aiding and abetting

instructions.

In Nye & Nisson v. United States, 336 U.S. 613 (1949), this Court approved Judge Learned Hand's definition:

> "In order to aid and abet another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his actions to make it succeed.'" Nye & Nisson, supra, at 619; citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

In Morei v. United States, 127 F.2d 827 (6th Cir. 1942), the court defined an aider and abetter (then called an accessory before the fact) thusly:

> "A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the

criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intentions between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a prearrangement to do the act; and to constitute one an aider and abetter, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the act, but he must share the criminal intent or purpose of the principal." Id., at 831; [citations omitted]; cited with approval in Robinson v. United States, 262 F.2d 645, 649 (9th Cir. - 1959).

The arguments offered on the conspiracy charge are similarly applicable here. Rossi's role as purchaser was essentially passive. Conspiracy and aiding and

abetting require affirmative action. That was not this case.

## CONCLUSION

We face an interesting dilemma. While Petitioner was clearly involved in the purchase (and we might assume, sale) of large quantities of marijuana, he was charged with and convicted for smuggling activities, a sideline he was not involved with. The easy way to dispose of the case would be to issue a denial of this Petition; the tough way is to tackle it on the merits. "What's the difference" we might ask, he was involved in illegal activities. Assuredly he was, but times are changing. Marijuana no longer carries the stigma it once did. This has been reflected in new legislative proposals as well as novel treatment of offenders. It's one thing to moralize, compromise or rationalize when faced with a crime of violence. But when a truly free society need punish

for a victimless crime -nay, the wrong crime- then we have to wonder about the motives we're concealing behind the veil of Law.

Respectfully submitted,

SPIVEY & GIOVANAZZI

By Joseph Giovanazzi
JOSEPH GIOVANAZZI
Counsel for Petitioner

GO, CALIFORNIA, THURSDAY, MARCH 4, 1971 AT 9:30 A.M.

- - -

Other matters.)

The following is a transcript of the tape recording in open court in the presence of the jury)

"Arturo and Joey. The following telephone number Area Code 213-762-5951 --"

MR. FILSINGER: Is this the first conversation, June fourth?

MR. LUCIDO: That's correct.

MR. FILSINGER: 1970?

MR. LUCIDO: Yes.

"JOEY: Hello.

ARTURO: Joey?

JOEY: Speaking.

ARTURO: This is Sonny.

JOEY: Sonny!

ARTURO: What's wrong?

JOEY: Where are you?

ARTURO: Over here in Fairmount.

JOEY: What's up?

ARTURO: Hey, Joey --

JOEY: Yeah.

ARTURO: What are you doing right now?

ARTURO: I just came home from Tijuana.

JOEY: Uh-huh.

ARTURO: And I lost your phone number again.

JOEY: Yeah?

ARTURO: Yeah. And my wife is out of jail right now.

JOEY: She's out of jial?

ARTURO: Yeah.

JOEY: What's her last name?

ARTURO: My wife's last name?

JOEY: Yeah.

ARTURO: Galban.

JOEY: What?

ARTURO: G-a-l-b-a-n.

JOEY: Someone gave me the wrong name.

ARTURO: What do you mean,"the wrong name"?

JOEY: I was running a check on you, man, I heard from you in a couple of weeks. I was running a n you. Your people--your Abraham and someone else here and gave me a different name and tried to get ney out of me so he could get out of state.

ARTURO: Who?

JOEY: He said that somebody down there tipped off ds" that they think that your wife said something.

ARTURO: Abraham tried to get a money out of you?

JOEY: Yeah, so he could split. He said that

e or somebody talked to the "Feds" and turned my name

ARTURO: To the police?

JOEY: Yeah.

ARTURO: When he told you this?

JOEY: The other day.

ARTURO: He went to your house?

JOEY: Yeah, last week.

ARTURO: By hisself?

JOEY: Him and Margie--not Margie--him and Beatrice.

ARTURO: Him and Beatrice? How come he don't tell
ng?

JOEY: I don't know.

ARTURO: I'm going to talk to Abraham later on,
on't mention nothing, he was talking to you--some-

JOEY: He said that he had to go down to Mexico,
ld him that I just got burned for $9,000., and that I
give him nothing.

ARTURO: Oh, this guy, this is supposed to be my

JOEY: Well, I don't know about being your friend,
old me that he heard from somebody that the "Feds"
I was, and everything else, and he said he thought it
m that end--from your end after your wife being busted--

on't know.

ARTURO: I told you, you know, tell him what he
ng over there and then he went to Tijuana and I called
, because I went to jail for a ticket, and I told
go and get some money from my aunt and come over here
, and then I told him, "Don't go and talk to Joe for
Just come to pick me up right away," and then I went
to you later on, and get my wallet and get my clothes
I come over here and I was to look for Abraham and I
his house and nobody knows where he is right now.

JOEY: Yeah, we think he took off--I think he
for Mexico. He went back down there, or something,
know.

ARTURO: With Beatrice?

JOEY: Yeah.

ARTURO: How come he don't mention nothing about
d I told him, you know, you went to see Joey? He say,

JOEY: He was up here. Jay was here when he was here
ld lady was here. They'll tell you.

ARTURO: What are you doing right now?

JOEY: I'm just sitting down ready to have a bite
What's up?

ARTURO: Nothing.

JOEY: Got something for me?

ARTURO: Probably.

JOEY: Probably?

ARTURO: Yeah.

JOEY: What do you mean, "probably"?

ARTURO: Yeah. Well, do you know where I can get or a hundred kilos?

JOEY: Do I know where you can get some?

ARTURO: Yeah.

JOEY: No. I've stopped doing business, man, on of they say that you--somebody on your end "finked" to s."

ARTURO: Me?

JOEY: Somebody. They said they know my activities, pped doing everything. You can't get nothing?

ARTURO: Yeah, but I don't have enough money.

JOEY: Well, there's nothing up here, man, I can't more out "front." I wouldn't do it, not a nickle.

ARTURO: Well, I call tomorrow. I have to go and Abraham, if he's here, so nobody knows where he is w. And his mother, he told me he saw Abraham with that day, and he's supposed to go home again. He nt home.

JOEY: So you just came from Tijuana. You didn't thing back with you?

ARTURO: No. Well, you know, if I cross something

he Border, I'm afraid to get busted--

JOEY: Yeah.

ARTURO: Because my wife is supposed to be over my house, and she's not there, and I don't know where right now.

JOEY: Yeah.

ARTURO: Nobody knows. I don't know probably some- iding someplace.

JOEY: I don't know.

ARTURO: If I see Abraham I'm going to tell him that nt over there and he want to ask you for some money, I ow why--

JOEY: I don't know either, but it doesn't bother hrew him the fuck out of here. I stopped all business. doing everything. I got a job--not this shit--I'm not have no one fucking, spilling their guts out on me.

ARTURO: Well, nobody mentioned your name. I don't you--

JOEY: Well, I lost a lot of money, you know, between omebody else I lost a lot of money, you know. What g to do? I can't stay in business doing that.

ARTURO: Uh-huh. Okay. Well, I call you later on find Abraham.

JOEY: Okey-doke.

ARTURO: Okay?

JOEY: Okay.

ARTURO: 'Bye."

he following telephone call was made on July eighteen
-seventy between a confidential informant and Joey
. John Doe. Joey.

"ANGIE: Hello.

ARTURO: Hello, Joey there?

ANGIE: Who's this?

ARTURO: Huh?

ANGIE: Who's this?

ARTURO: This is Sonny.

ANGIE: Sonny?

ARTURO: Uh-huh.

ANGIE: Hold on a minute.

Do you have a number?

ARTURO: Huh?

ANGIE: Do you have a number he can call you at?

ARTURO: Yeah. Is 6349--

ANGIE: Wait a minute, let me find a pen.

ARTURO: 6349497.

ANGIE: 6349496?

ARTURO: No, seven.

ANGIE: 97. Okay, 6349497.

ARTURO: Uh-huh.

ANGIE: Okay, Sonny, he'll call you back in a few

ARTURO: Yeah. Uh, do you interested in getting
g?

JOEY: Am I interested?

ARTURO: Yeah.

JOEY: All the time. Well, you know, like I drop
y--drop in, you know.

ARTURO: Yeah. Yeah.

JOEY: Depending on what the fuck happens, but
n sick and I just got sick of the whole fucking thing,
st decided to go to school and fuck it, you know.

ARTURO: Uh-huh.

JOEY: Also, I'm learning a trade and I'm going to
hell out of it.

ARTURO: Uh-huh.

JOEY: That's what I've been trying to do.

ARTURO: Uh-huh.

JOEY: What's been happening with you?

ARTURO: Nothing wrong, I got forty-three kilos.

JOEY: Uh-huh.

ARTURO: If you want a-- you know--

JOEY: What kind of price?

ARTURO: A hundred and fifteen.

JOEY: What happened to those other twenty you
there in Mexico that was supposed to be left of mine?

ARTURO: They're still there.

JOEY: They're still there?

ARTURO: Yeah.

JOEY: (Laughter.)

ARTURO: Somebody's talking to you in the phone?

JOEY: Huh?

ARTURO: Somebody's over there with you?

JOEY: Is somebody over here? Just my old lady. le. Have I got a phone number here for you?

ARTURO: Well, this is a phone booth for here to later on or something, you know.

JOEY: Oh, yeah. Well, I'll have to get ahold of , see, because I've been out of it for like about two three weeks.

ARTURO: Uh-huh.

JOEY: I'm going to have to find my people, and find they are, see if they can handle them.

ARTURO: Uh-huh.

JOEY: What kind of weight on them?

ARTURO: About, just almost two pounds.

JOEY: Almost two pounds?

ARTURO: Yeah, it's pretty good size. They're like sold it before, the big ones.

JOEY: Yeah.

ARTURO: And I have to make some money, because

JOEY: Yeah, I know.

ARTURO: (Answer unintelligible.)

JOEY: Yeah, I can dig it.

Well, I was hurting there for a while myself, , and then I made some money and I just said, "Fuck it, ll, I'm going--" you know, "I'm going to walk out of ake something with it out of this fucking business--" .

ARTURO: Yeah.

JOEY: So I did. So I've just been sitting loose t two or three weeks, and I haven't done anything, and school every day and come home and go to sleep or go ol.

Well, listen, can you give me a call first the morning?

ARTURO: What time?

JOEY: Around ten, or so?

ARTURO: Ten?

JOEY: Yeah.

ARTURO: Okay.

JOEY: All right?

ARTURO: Okay.

JOEY: And I'll probably be able to take care of .

ARTURO: Okay

JOEY: I'll get in touch with my people tonight.

ARTURO: Okay.

JOEY: All right?

ARTURO: Uh-huh.

JOEY: All right, Sonny, later.

ARTURO: 'Bye."

ther matters.)

- - -

make.

. HABER: Yes, thank you, your Honor. I have a for judgment of acquittal, your Honor, addressed five counts of the charges in this indictment.

First, I would address myself to the conspiracy recognizing that an express agreement does not -- I fail to find any evidence at this point of implied agreement between Joey and anybody else.

My position is as follows: That at best, Mr. was a purchaser. I think the testimony is clear. 't dispute it. He was a purchaser of kilos of a, he's a buyer of marijuana, and that in and of oes not make him a co-conspirator.

COURT: I agree with that, yes.

HABER: Pardon me?

COURT: I would agree.

HABER: Well, what else is there? In the first t is with reference to March 14th, 1970. Now, in rt act it is alleged that five people went to r. Johnson not being one of those five.

COURT: That wouldn't help you very much, would it, rgument?

HABER: I believe so.

COURT: On what theory? The statute says that overt act is necessary, and it doesn't have to be

y all of the "conspirators".

R. HABER: Well, I'm not -- I'm trying to go through tem of possible involvement here, trying to remove ent.

E COURT: Tell me, what's "frailty"? With five not your client, as the overt act, number one?

. HABER: Well, I'm just suggesting to the Court didn't go to Mexico. I just want to include that.

I'll go on to the next.

E COURT: There is no doubt, from the testimony heard, that he wasn't in Mexico.

HABER: Okay. Well, May 29, 1970 it's alleged that to Mexico. I think the testimony is clear that he exico, but I don't -- I fail to see where his in Mexico had anything to do with the marijuana ion.

And Mr. Arreola testified that Mr. Johnson told Johnson's purpose in going down there was to some items, I think he said, "Pesos in a jewlery

The marijuana was picked up either in Rosarita Ensenada. I'm not clear which of the two locations tained at. There is a statement by Arreola that ot back to the motel he told Joey how much he had. I think his testimony was impeached by

of the statement he made on June 24th to Agent Lucido.

There is no involvement in a marijuana transaction part of Johnson in Mexico on May 29th.

Now, I think I'd rather dwell on the matter of being nothing more than a buyer. I don't see any ce of an agreement here. It's alleged that he ed with Carrillo, he met Carrillo once, they got into ment, for what reasons I'm uncertain. Where is the acy here?

COURT: I think it's a question of fact for the I'm denying your motion with regard to Count One, ve serious doubt about all of the remaining counts.

Let me ask the District Attorney about the g counts.

What is the theory, Mr. Filsinger, about the t's implication on the substantive counts? How id, abet, procure and so forth, the commission of tantive crimes?

Let's take the first one that relates to March 15th.

FILSINGER: Frankly, your Honor, I don't feel the is probably sufficient, March 15th, to the ive charges.

COURT: I'll dismiss Counts Two and Three and I r you on the substantive Counts Four and Five and to June 2.

. FILSINGER: Yes, your Honor.

I believe, as I recall the testimony of Arreola, ed that prior to making the trip on May 29th he had rsation with the defendant in which he advised the nt that he was going to Mexico to pick up marijuana, defendant said that he would buy this marijuana was brought into the United States.

Then Joey goes along and there's a conversation ed to by Arreola and substantiated by Beatrice to the effect that the defendant was advised that the a, approximately 50 kilos, was in the Cadillac.

By offering to purchase the marijuana and being in Tijuana at the time of the pick-up, though he here --

COURT: Tell me what he did to "knowingly smuggle destinely introduce marijuana"?

FILSINGER: Well, he offered to buy -- for one suppose that would be aiding in the transporting particular marijuana. He was referring to this a.

COURT: It puzzles me, really. How does one, who ng to buy contraband like that, aid in the smuggling?

FILSINGER: He provided a source for sale.

COURT: Does he by that action -- could he be of inducing the other people to do it?

. FILSINGER: Inducing, yes, your Honor, and I believe
sence in Tijuana was moral support, if nothing else.
E COURT: The evidence seems to be without contra-
that he left Mexico on the 30th of May. Is your
t, that is, prior promise to purchase, even though
then not in Mexico at the time of the Border crossing,
over with the other conspirators?
FILSINGER: As far as the conspiracy goes, I think
inly is a conspiracy.
COURT: Well, I deny the motion.
FILSINGER: It would be the Government's argument
promise to pay was in fact an inducement in the
ation in this transportation of the marijuana which
was going to be brought back at this time from Mexico.
COURT: What about the Fifth Count which is a little
erent and that's the versus there, "having received
aled and facilitated the transportation"? Would
hat his promise to purchase aided and abetted,
counseled, or procured the receiving, concealment
itation?
FILSINGER: Yes, your Honor, because implicit in
ment to buy was the fact that delivery had to be
im beyond the Border, had to be brought in and
d before the sale was completed.
COURT: Well, I have some misgivings. I'll wait and

ar you, Mr. Haber.

. HABER: Yes. Thank you very much, your Honor.

Your Honor, I can't say that my notes are that , but I can't recall any testimony from Arreola that ndicating to Joey in conversations with Joey that he ng down to Mexico to pick up kilos of marijuana.

COURT: I think that's quite clear in the case, but be wrong, too.

HABER: I remember Arreola's testimony as to two made to Joey.

COURT: They were made in the States here.

HABER: Prior to the first trip to Mexico. Then he d that the three sales, two -- 50 kilos and one 75 at first trip.

There is no question but that there were sales ions that went back and forth, but I don't recall imony, that's the first thing as to his promise ase kilos of marijuana, and if he did make them, we don't know precisely that -- I mean, we don't cisely when that statement was made, if it was cause Arreola doesn't remember the date.

His testimony was very vague, at best. It could n in March.

COURT: If you wanted to add to it from the back he transaction, the telephone conversation on --

et what day it was -- the July conversation that was
red. Your client said, "Where's my 20 kilos that
ft in Mexico that's mine?" That would indicate to
least, there was some kind of an agreement to buy
ff and bring it here.
. HABER: Well, that really seems to me -- goes to
stion, the idea that Joey had agreed to purchase
ma, the idea that, one, the idea that would create
d for contraband, aid and abet in the crime.
E COURT: You put your finger on my problem.
. HABER: That's 10; would you say?
E COURT: My problem is if a man makes an offer to
promises money for the purchase and for the
in the United States, does he violate the aiding
tting thing with regard to, one, the smuggling which
ourth Count. And to the concealing and facilitating,
ll the counts I have some doubt about. But what I'm
do, I'm going to reserve on the motion to protect

You haven't rested yet; have you?
HABER: No, I haven't.
COURT: So rather than reserve on that, I will deny
ion addressed to Counts Four and Five and One, grant
ion on the Government's concession in regards to
and Three, and you have an exception.

ow, tell me, are you going to go forward with some

R. HABER: No.

E COURT: So you do rest?

R. HABER: I rest.

E COURT: And you renew your motion at the end of
le case and on that motion I will reserve with
to Counts Four and Five.

. HABER: I'd like -- Yes.

I'd prefer to be heard for just a few more minutes
e, if you think it appropriate.

E COURT: I have no objections to you confining your
t to the legal argument whether or not a person can
sed on Section 2 of committing those two crimes in
d Five.

. HABER: Yes, I would like to address myself --

E COURT: Are there any cases on that you are
t with?

HABER: Well, I have the number in the footnote;
four cases that indicate -- I take it back-- That he
lved, cases where a buyer is held not to be a co-
tor, can't represent to the Court that the buyer on
aided and abetted by creating a market.

I think to take the position that if you create
of an illegal product you are an aider and abettor

uous. One could extend the logic that person who
es a lid of marijuana for his own personal use and
hat he's creating the demand here, therefore, he
and abetted in the importation of that contraband
he country, I think --

HE COURT: I think that would be far-fetched. Assume
no association with the importers at all, just created
hand by being a consumer, is that your argument?

. HABER: Yes.

HE COURT: I would agree with that, but I don't think
this case.

Are you talking now about some guy standing on the
out here and he buys marijuana from X, therefore, the
ent can charge him with the actual importation?

. HABER: Well, there are some cases here that really
analogy somewhat far-fetched. I can see that if you
tuation here where there was some proof that Johnson
money ahead of time, that would be aiding and
, I think.

COURT: I don't think there is much of a legal
ion between giving the money in advance and promising
or it in the future.

HABER: Your Honor, I could be wrong, but I don't
ny testimony that he agreed to pay for marijuana
to be delivered. I don't believe there was any

ommitment.

IE COURT: Well, there is a great deal of talk about antity and quality and so forth, but in any event, I ou're protected in the end of all of the evidence in e. I'm reserving on your motion with regards to Four and Five and I'll submit to the Jury Counts One, d Five and dismiss Counts Two and Three.

And my policy on summation is to ask each lawyer g he wants. Whatever he wants, I will give him, top him in the middle of a word if he reaches that So I first ask the Government, how long would you

. FILSINGER: I think 20 minutes, your Honor.

E COURT: 20? Mr. Haber?

. HABER: Well, based on your policy I'm afraid to timate.

T COURT: Don't.

. HABER: I would say a half hour.

T COURT: All right.

Now, have you got any instructions you want to look at?

. HABER: Yes, I do.

. FILSINGER: May I, your Honor, just make one more on that Four and Five?

It's possibly agent-principal here that the

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is 404 North Avalon Boulevard, Wilmington, California, 90744. On April 14, 1972, I served the within PETITION FOR A WRIT OF CERTIORARI on the attorney for respondent in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Wilmington, California addressed as follows:

UNITED STATES ATTORNEY
United States District Court
Southern District of California
325 West "F" Street
San Diego, California 92101

AFFIDAVIT OF SERVICE BY MAIL

(continued)

Executed at Wilmington, California,
this 14th day of April, 1972.

JOSEPH GIOVANAZZI

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 14TH DAY
OF APRIL, 1972.

OFFICIAL SEAL
Sara M. Stubblefield
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Sept. 15, 1975

Notary Public

SUPREME COURT, U. S.
JUN 5 1972
MICHAEL RODAK, JR., CLERK

No. 71-1343

# In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH ROSSI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D. C. 20530.*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to smuggle, transport, receive, conceal and sell marihuana, in violation of 18 U.S.C. 371, and of substantive counts, in violation of 21 U.S.C. (1964 ed.) 176a. He was sentenced to concurrent five year sentences on the conspiracy charge and two substantive counts. The court of appeals affirmed without an opinion, and denied

a petition for rehearing on March 7, 1972. On April 8, 1972, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including April 15, 1972. The petition was filed on April 19, 1972, and is out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason to grant the writ.

1. The pertinent facts are not disputed. In March 1970 Arturo Arreola Placer (Arreola), a co-conspirator who testified for the government, received a telephone call from petitioner, who stated that he wanted to purchase between 50 and 100 kilos of marihuana (R. 28-29, 69). Arreola obtained the marihuana from one Thomas Carrillo; petitioner went to Arreola's apartment to receive it, satisfied himself regarding the quality and size of the marihuana, and said that he would purchase 50 to 100 kilos or more from Arreola in the future. He asked Arreola the source of the marihuana and was told that it came from a friend in Mexico (R. 30-36).

On March 14, 1970, Arreola went to Tijuana, Mexico, and obtained a shipment of marihuana. Petitioner made three purchases from Arreola, totalling 175 kilos (R. 41), between March 14 and May 29, 1970. During one of these transactions petitioner met Carrillo, Arreola's boss, and they argued concerning the quality and size of the marihuana. Petitioner paid Arreola less than the usual amount for this marihuana, and stated that he did not want to do any more business with Carrillo (R. 41-43, 74).

On May 28, 1970, Arreola told petitioner that he was going to Mexico for additional marihuana. Petitioner indicated that he would purchase the marihuana when Arreola returned, but later decided to go to Mexico with him (R. 44-46, 75). During the ensuing trip, Arreola purchased 50 kilos of marihuana in Mexico. Petitioner discussed the purchase with him, and immediately thereafter returned alone to this country (R. 48-49, 81, 120-123). Arreola, his wife and others attempted to return with the marihuana in two cars. His wife was arrested in one of the cars, the marihuana in it was seized, and Arreola left the rest of the marihuana in Mexico (R. 51-53). In July, customs agents recorded a telephone conversation between petitioner and Arreola with the latter's consent, and petitioner asked Arreola "[w]hat happened to this other 20 you had down there in Mexico that was supposed to be the rest of mine?" (R. 50-53, 106-107, 120-121, 136-137, 162).

2. Petitioner concedes that this case involves "a large spectrum of marihuana trafficking, from acquisition to transporting to sale," and that "[t]here is no doubt but that Petitioner occupied one of those niches" (Pet. 3). He contends, however, that he was only a purchaser of the marihuana, and that there is insufficient evidence to show that he participated in a conspiracy or was guilty of the substantive offenses (Pet. 4, 20, 28, 30-31).

a. The evidence set forth above established that petitioner encouraged Arreola to smuggle marihuana into this country from Mexico, and that the latter

did so after petitioner had indicated that he was a ready buyer. Petitioner also purchased marihuana from Arreola on several occasions, and accompanied him to Mexico to get more. This was sufficient evidence from which the jury could infer that petitioner was a participant in a smuggling conspiracy. Compare *Direct Sales Co.* v. *United States*, 319 U.S. 703; *United States* v. *Warner*, 441 F. 2d 821 (C.A. 5).

b. The contention that the trial judge should have acquitted petitioner on the two substantive offenses of which he was convicted[1] similarly is without merit. Petitioner correctly points out that the government's theory was that he aided and abetted in these offenses, and the jury was properly instructed regarding this (see R. 204-205). His claim is that the evidence showed at most that he was "an accessory after the fact" and was insufficient to support his conviction of aiding and abetting, since his "role as [a] purchaser was essentially passive" (Pet. 28, 30). But, the evidence supports the view that petitioner was not merely "passive," but actively participated in several phases of the operation. On these facts, the jury could properly determine that petitioner had aided and abetted in the offenses charged.

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[1] One count (count 4) charged smuggling of marihuana on June 2, 1970; the other (count 5) charged the receipt, concealment and facilitation of the transportation of marihuana on that same date.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JUNE 1972.

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